

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ALEXANDER VENIAMIN SVIRIDIUK,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

CASE NO. C14-5017 BHS

ORDER DENYING
PETITIONER'S MOTION TO
VACATE, SET ASIDE OR
CORRECT SENTENCE

This matter comes before the Court on Petitioner Alexander Veniamin Sviriduk's

(“Sviridiuk”) motion to vacate, set aside or correct sentence (Dkt. 1). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby denies the motion for the reasons stated herein.

I. PROCEDURAL HISTORY

On December 7, 2011, the Government filed an indictment against Sviridiuk and his cousin, Natalya Sviridyuk (“Natalya”), alleging six counts of bank fraud. Cause No. 11-CR-5581BHS, Dkt. 1. On February 17, 2012, Natalya pled guilty to all six counts.

Id., Dkt. 24.

1 On May 17, 2012, the Government filed a superseding indictment against only
2 Sviridiuk alleging twenty counts of bank fraud. *Id.*, Dkt. 38. On October 9, 2012, the
3 Court began a five-day jury trial on the charges in the superseding indictment against
4 Sviridiuk, who was represented by attorney Des Connall. *See id.*, Dkts. 61–66. On
5 October 15, 2012, the jury returned a verdict of guilty on all twenty counts. *Id.*, Dkt. 70.

6 On January 29, 2013, Sviridiuk filed a motion to substitute attorney Allen Bentley
7 for Mr. Connall. *Id.*, Dkt. 85. On January 30, 2013, the Court granted the motion. *Id.*,
8 Dkt. 88.

9 On June 25, 2013, the Court sentenced Sviridiuk to fifty-four months
10 imprisonment, five years supervised release with standard & special conditions, and
11 \$1500 special assessment with restitution to be determined at a subsequent hearing. *Id.*,
12 Dkt. 106.

13 On July 8, 2013, Sviridiuk filed a notice of appeal. *Id.*, Dkt. 116.

14 On September 3, 2013, the Court entered an amended judgment that included
15 \$901.632.88 in restitution. *Id.*, Dkt. 129.

16 On January 6, 2014, Sviridiuk filed the instant motion to vacate, set aside, or
17 correct his sentence. Dkt. 1. On March 18, 2014, Sviridiuk filed two memorandums in
18 support of his motion. Dkts. 9 & 11. On April 21, 2014, the Government responded.
19 Dkt. 14. On May 16, 2014, Sviridiuk replied. Dkt. 21.

20 **II. FACTUAL BACKGROUND**

21 The Government's case against Sviridiuk was based on the theory that he
22 orchestrated a scheme to defraud J.P. Morgan Chase and other financial institutions. The

1 Government alleged that Sviridiuk submitted false student loan applications on behalf of
 2 his clients when the clients had no intention of attending school. The Government called
 3 numerous witnesses including: the registrar of Washington State University, the registrar
 4 of the University of California Irvine, a bank fraud manager, multiple borrower or clients
 5 of Sviridiuk, and co-defendant Natalya. *See* Dkt. 14 at 4–27. In defense, Sviridiuk
 6 testified and he called one of his clients, Nikolay Trachuk. *Id.* at 27–36.

7 **III. DISCUSSION**

8 In this petition, Sviridiuk raises five grounds for relief that are all based on
 9 ineffective assistance of counsel by Mr. Connall. “To establish ineffective assistance of
 10 counsel ‘a defendant must show both deficient performance [by counsel] and prejudice.’”
 11 *Premo v. Moore*, 131 S. Ct. 733, 739 (2011) (quoting *Knowles v. Mirzayance*, 556 U.S.
 12 111, 122 (2009)). The Supreme Court has explained defendant’s burden as follows:

13 To establish deficient performance, a person challenging a
 14 conviction must show that “counsel’s representation fell below an objective
 15 standard of reasonableness.” [*Strickland v. Washington*, 466 U.S. 668, 688
 16 (1984)]. A court considering a claim of ineffective assistance must apply a
 17 “strong presumption” that counsel’s representation was within the “wide
 18 range” of reasonable professional assistance. *Id.*, at 689, 104 S. Ct. 2052.
 19 The challenger’s burden is to show “that counsel made errors so serious
 20 that counsel was not functioning as the ‘counsel’ guaranteed the defendant
 21 by the Sixth Amendment.” *Id.*, at 687, 104 S. Ct. 2052.

22 With respect to prejudice, a challenger must demonstrate “a
 23 reasonable probability that, but for counsel’s unprofessional errors, the
 24 result of the proceeding would have been different. A reasonable
 25 probability is a probability sufficient to undermine confidence in the
 26 outcome.” *Id.*, at 694, 104 S. Ct. 2052.

27 *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011).

1 “The benchmark for judging any claim of ineffectiveness must be whether
2 counsel’s conduct so undermined the proper functioning of the adversarial process that
3 the trial cannot be relied on as having produced a just result.” *Strickland*, 466 U.S. at
4 686. The likelihood of a different outcome must be “substantial,” not merely
5 “conceivable.” *Richter*, 131 S. Ct. at 792.

6 **A. Performance**

7 Sviridiuk argues that Connall’s representation fell below the objective standard of
8 performance for five separate reasons

9 **1. Exculpatory Information**

10 Sviridiuk claims that Connall failed to bring out exculpatory information through
11 cross-examination of Natalya. Dkt. 11 at 3–7. It is undisputed that, during the initial
12 investigation, Natalya told Agent Fredrickson that the clients were told they would have
13 to go to school and that one of the reasons she applied for her own student loan was to go
14 to school. This was a prior inconsistent statement because, at trial, Natalya testified that
15 she had no contact with the clients, did not know whether the clients were told that they
16 would have to attend school, and she had no intention of going to school when she
17 applied for her own student loan. Tr. 4.44–85¹. It is logical to assume that any attorney
18 would impeach an incriminating witness, but Connall’s closing argument sheds light on
19 his strategy to distance Natalya from any client contact and place blame on Natalya for
20 transferring the information that Sviridiuk obtained from the initial client contacts to the

21
22 ¹ Refers to the trial transcript, day 4, pages 44–85.

1 online applications. Tr. 5.73–84. Connall explained that the business operations were set
2 up such that Sviridiuk would meet with clients and inform them that they would have to
3 attend school in order to obtain the student loan. *Id.* Then Sviridiuk would give the
4 client’s information to Natalya to enter into the online forms and submit the applications.
5 *Id.* Connall’s strategy would be undermined if any evidence was admitted linking
6 Natalya to the initial client contacts, even if the evidence could have possibly impeached
7 Natalya’s testimony at trial. Therefore, the Court finds that such a strategy was
8 reasonable and Connall did not commit an error, let alone a serious error, in failing to
9 introduce Natalya’s prior inconsistent statement.

10 **2. Exculpatory Witness**

11 Sviridiuk argues that Connall provided ineffective assistance when he failed to
12 interview and call a potentially exculpatory witness, Larissa Sviridiuk (“Larissa”). Dkt.
13 11 at 7–11. First, the exculpatory nature of Larissa’s testimony would only have
14 amounted to the circumstances surrounding her loan. Her testimony would not have
15 undermined the overwhelming testimony from the numerous other clients who admitted
16 that they had no intention of going to school. Therefore, even if the testimony was
17 offered, it would have had little value and the decision not to admit it was not objectively
18 unreasonable.

19 Second, the merits of Larissa’s testimony are suspect at best and hardly
20 exculpatory. Sviridiuk claims that Larissa would have testified that she planned to attend
21 school, but changed those plans when her father had a “series of heart attacks.” Dkt. 11
22 at 8. Larissa, however, enrolled in classes and applied for the loan on May 7 and then

1 withdrew from class two days later on May 9. Dkt. 14 at 46. Thus, her father would
2 have had to have suffered a series of heart attacks on one day, May 9. Moreover, the loan
3 was not dispersed until May 12, days after Larissa withdrew from school. This timeline
4 undermines the alleged exculpatory nature of the testimony. Therefore, the Court finds
5 no error in Connall's decision not to interview or call Larissa.

6 **3. Interpreter**

7 Sviridiuk argues that Connall erred when he did not request an interpreter for the
8 only other defense witness, Nikolay Trachuk ("Nikolay"). Dkt. 11 at 12–13. This
9 argument is without merit. The argument is based solely on investigator's notes
10 referencing Nikolay's English ability as limited and investigator's use of an interpreter.
11 Sviridiuk, however, fails to cite to a single point during trial where Nikolay was unable to
12 understand English. In fact, Nikolay's direct examination provides as follows:

13 [Connall]: But you've been taking English lessons and you communicate
quite often in English, correct?

14 [Nikolay]: Yes.

15 Tr. 5.11. Therefore, Sviridiuk has failed to show that Connall's assistance was
16 ineffective on this issue.

17 **4. Students' Withdrawals**

18 Sviridiuk argues that Connall was ineffective because he did not present evidence
19 that some of Sviridiuk's clients were dropped from class by the educational institutions.
20 Dkt. 11 at 13–14. Sviridiuk argues that this evidence would have undermined the
21 prosecution's theory and argument that Sviridiuk knew that clients were not attending
22 school because Sviridiuk himself withdrew students from the universities. *Id.* First, in

1 closing, Connall stated that students were dropped by the universities if they did not
2 appear. Tr. 5.74. While Connall could have articulated the exact numbers of university-
3 dropped students, the failure to do so does not rise to the level of ineffective assistance.
4 Connall's decision could be supported by numerous theories, including making a vague
5 rebuttal to the prosecution's case on the issue so that more attention was not drawn to the
6 students who were explicitly dropped by Sviridiuk or someone else with the ability to do
7 so. Moreover, the fact that some students were automatically withdrawn would not have
8 undermined the testimony from the testifying clients that they had no intention of going
9 to school and that Sviridiuk assured them that they could use the money for whatever
10 they wanted. Therefore, the Court finds that Connall's decision on this issue did not fall
11 below an objective standard of reasonableness.

12 **5. 404(b) Evidence**

13 Sviridiuk argues that Connall was ineffective because he failed to suppress
14 evidence under Federal Rule of Evidence 404(b). The contested evidence is information
15 regarding whether Sviridiuk inserted false financial information on the borrower's loan
16 applications, such as inflated yearly incomes. Dkt. 11 at 14–17. Sviridiuk's argument is
17 without merit. This evidence is (1) direct evidence of the charged crime of committing
18 bank fraud, (2) admissible evidence that is inextricably intertwined with the charged
19 crime, and (3) in any event, admissible evidence of his intent to defraud. *See* Dkt. 14 at
20 56–59. Therefore, the Court finds no error in Connall's failure to contest evidence under
21 Rule 404(b).

1 **B. Prejudice**

2 Even if Connall's performance fell below the reasonable standard of conduct,
3 Sviridiuk has failed to show that he was prejudiced. The Government's case was
4 extremely strong and nothing Sviridiuk contests shows a "reasonable probability . . .
5 sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. While
6 a different outcome is conceivable, the likelihood of such an outcome is not substantial.
7 *Richter*, 131 S. Ct. at 792. Therefore, Sviridiuk has failed to meet his burden on the
8 prejudice prong as well.

9 **C. Certificate of Appealability**

10 A petitioner seeking post-conviction relief under 28 U.S.C. § 2255 may appeal a
11 district court's dismissal of the federal habeas petition only after obtaining a certificate of
12 appealability ("COA") from a district or circuit judge. A certificate of appealability may
13 issue only if a petitioner has made "a substantial showing of the denial of a constitutional
14 right." *See* 28 U.S.C. § 2253(c)(2). A petitioner satisfies this standard "by demonstrating
15 that jurists of reason could disagree with the district court's resolution of his
16 constitutional claims or that jurists could conclude the issues presented are adequate to
17 deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327
18 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

19 In this case, the Court concludes that Sviridiuk has failed to make a substantial
20 showing of the denial of a constitutional right. Therefore, the Court declines to issue a
21 COA.

IV. ORDER

2 Therefore, it is hereby **ORDERED** that Sviridiuk's motion to vacate, set aside or
3 correct sentence (Dkt. 1) is **DENIED** and the Court **DECLINES** to issue a Certificate of
4 Appealability.

5 Dated this 28th day of August, 2014.



BENJAMIN H. SETTLE
United States District Judge